

PRIVATE.

THE FISHERY QUESTION.

1. The Fishery question, in its present phase, relates principally to the rights and liberties of United States fishermen under Article 1 of the Treaty of 1818. This article, after granting to United States fishermen liberty to take fish on the southern coast of Newfoundland from Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and on the coasts, bays, harbors and creeks from Mount Joly on the south coast of Labrador to and through the Straits of Belle Isle and thence northwardly for an indefinite distance, without prejudice to the rights of the Hudson's Bay Company, and extending to them also liberty to dry and cure fish on the unsettled portions of Labrador and of the south coast of Newfoundland, proceeds to say:

"And the United States hereby renounces forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any manner whatever abusing the privileges hereby reserved to them."

The contention of the Dominion authorities is that the words limiting the visits of American fishermen to the shore to the four purposes specified, namely, "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever," are to be read and construed in their literal sense, without reference to the condition of things which existed in 1818, or to the changes which have since taken place in consequence of reciprocal legislation and otherwise in the maritime and commercial relations of the contracting parties. According to this construction, unless they have taken out licenses under the existing *modus vivendi* for which they have to pay at the rate of \$1.50 per ton, United States fishing vessels are not allowed to land for the purpose of transhipping their cargoes, either to vessels bound to the United States or to local Canadian railways; or for the purpose of purchasing bait from the Canadian inshore fishermen, or for the purpose of hiring Canadian fishermen to ship with them, or for the purpose of buying ice, provisions, barrels or sea-stores, which they may require to enable them to complete the season's work. In short, except for the services or conveniences named in Article 1, they are absolutely excluded from Canadian ports.

It appears from the records that this harsh interpretation did not take shape and form until 1852 or thereabouts. Between 1818 and 1852 a large number of American fishing vessels, fifty-one in all, were seized under various pretexts by British and colonial ships-of-war, under the authority of the Imperial Act of 1819 (59 George 3, cap. 38), giving effect to the provisions of the Treaty of 1818, of the Nova Scotia Act of 1836 (6 William 4,

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cap. 8), relating to the fisheries and for the prevention of illicit trade, and of the Prince Edward Island Act of 1843 (6 Victoria, cap. 14), relating to the fisheries and for the prevention of illicit trade. These seizures were made chiefly, as was alleged, (a) for fishing within the limits reserved to British fishermen by the Treaty of 1818, (b) for preparing to fish within those limits, and (c) for hovering in bays and harbors without being in need of shelter, repairs, wood or water. The colonial statutes just named, for the prevention of illicit trade, dealt, so far as they affected trading privileges at all, with violations of the colonial customs laws involved in the exchange or barter by United States fishermen of American goods for colonial-caught fish. So far as can be ascertained from a careful examination of the public documents, the only seizures made between 1818 and 1852 for the alleged offence of purchasing goods or bait from the colonial fishermen or coast population were those of the American vessels *Papineau* and *Mary* in 1840. No seizures appear to have been made during that period for the alleged offence of transshipping cargoes or hiring crews. This statement of fact is borne out by a report made by the Dominion Minister of Marine and Fisheries in 1870 (Dominion Sessional Paper No 12, 1871), in answer to a request by Lord Kimberley for information "as to what was the actual practice which prevailed previous to the Reciprocity Treaty (1854-66) between Great Britain and the United States in regard to the exclusion of American fishermen from trading or effecting commercial operations in the ports of the different provinces of British North America." The Minister (Hon. Peter Mitchell) mentions a number of seizures, but the only seizures coming within the category under discussion which he cites are those of the *Papineau* and *Mary*, which "were seized and sold for purchasing bait ashore." During the period in question, the customs collectors in Nova Scotia were in the habit of issuing permits of their own accord and without charge to United States fishing vessels desirous of purchasing goods or transshipping cargoes ashore: from which it is evident that such operations were not then held to constitute an invasion of British rights under the treaty. On August 28th, 1852, however, the Provincial Secretary of Nova Scotia (Mr. Joseph Howe), apparently on his individual authority, issued the following order prohibiting American fishing vessels from enjoying any commercial privileges in the ports of that colony:

"No American fishing vessels are entitled to commercial privileges in provincial ports, but are subject to forfeiture if found engaged in traffic. The Colonial collectors have no authority to permit freight to be landed from such vessels, which, under the convention, can only enter our ports for the purposes specified therein, and for no other."

On September 25th, 1852, the law officers of the Crown in England furnished an opinion, at the instance of the British Admiralty, regarding the powers of naval officers to seize or interfere with United States fishing vessels resorting to ports or harbors for purposes other than those defined in the Treaty of 1818. The law officers held that British naval officers were warranted in seizing American vessels for fishing within the prescribed limit; and that, independently of the express provisions of the statutes then existing, vessels resorting to ports or harbors for other than the purposes specified by the treaty, might be warned and compelled to depart by whatever force was reasonably necessary (Dominion Sessional Paper No. 12, 1871). It will be observed that the opinion of the law officers amounted to little more than this—that American fishing vessels had no absolute legal right under the treaty to trade in the harbors, or transship their cargoes. The Government of the United States has never urged that they have such a right under a strict construction of the letter of the

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treaty. No seizures seem to have been made for purchasing bait, hiring crews, or transshipping cargoes between 1852 and 1854.

From 1854 until 1866, when the Reciprocity Treaty was in operation, nothing of course was heard of the question. Between 1852 and 1870, the following Canadian statutes relating to the fisheries were passed :

1853—An Act (16 Victoria, cap. 60) relating to the coast fisheries, and for the prevention of illicit trade. (By the Province of New Brunswick.)

1862—An Act (25 Victoria, cap. 94) relating to the coast and deep sea fisheries. (By the Province of Nova Scotia.)

1866—An Act (29 Victoria, cap. 35) to amend the above.

1868—An Act (31 Victoria, cap. 61) respecting fishing by foreign vessels. (By the Dominion Parliament.)

1870—An Act (33 Victoria, cap. 15) to amend the above.

On the abrogation of the Reciprocity Treaty in 1866, the Canadian provinces having been confederated, the Dominion Government established a license system for American fishing vessels, and, on the creation of the cruiser service in 1870, began, under the statutes enumerated, to treat landing for the purpose of hiring crews, purchasing bait, or transshipping as a grave offence, and continued to do so until the Washington Treaty of 1871 came into operation. The policy of the Dominion authorities in this respect was agreeable, no doubt, to the fishing-vessel owners of the Maritime Provinces, who have always striven to incommode and harass their American competitors. But there are reasons for believing that it did not meet with the approval of the working fishermen, or of the coast population in general. Evidence on this point is furnished by the reports of the officers of British war vessels, which were assigned to the duty of assisting the Dominion cruisers in patrolling the fishery grounds; for example:—

In a report dated Nov. 22nd, 1870 (Dominion Sessional Paper, No. 5, 1871), Vice-Admiral Fanshawe, of the *Royal Alfred*, says: "The strong interest that both the resident British traders and the United States fishermen have in maintaining the trade would, in my opinion, render its suppression extremely difficult, even were it thought judicious to continue the attempt; whilst the combination between these two to evade British law, and the sympathies arising therefrom must be very undesirable." (*sic*.)

In a report dated Nov. 18th, 1870, Lieut. Cochrane, of Her Majesty's gunboat *Britomart*, says: "The inhabitants on the Nova Scotia coast from St. Mary's Bay to Cape Sable, I believe, prefer the Americans coming in, as they are in the habit of selling them stores, bait, and ice; and give them every information as to my movements." . . . "Wherever I went I found the people most anxious to know whether the Americans were still going to be allowed to come and purchase the frozen herrings; if they were not they had no other market for them, and the duty was so heavy they could not afford to take them into American ports themselves."

In a report dated November 7th, 1870, Commander Knowles, of Her Majesty's ship *Lapeing*, writing of the state of things along the Strait of Canso, says: "The collectors of customs find it impossible to enforce their authority, having no force to assist them. The sympathies of the inhabitants are entirely with the Americans, as the (American) schooners are principally manned by men who are natives of the Strait of Canso. The storekeepers and traders secure large profits from their intercourse with the crews."

In a report dated November 18th, 1870, Commander Poland, of Her Majesty's ship *Ploner*, which had been detailed to watch the fisheries of Prince Edward Island, says: "Every facility is given in the ports of the island to foreigners for obtaining and replenishing their stock of stores and necessaries for fishing."

Here is evidence from another source. In 1868 Mr. Stewart Campbell, member of the Dominion Parliament for the County of Guysborough, N. S., complained to the Dominion Government of the great loss which his constituents had sustained by the exclusion of United States fishermen from the liberty of landing for trading and transshipping purposes.—(Dominion Sessional Paper No. 12, 1869):—

"Mr. Stewart Campbell, after communication this day with the Hon. the Minister of Marine and Fisheries, begs to submit the following remarks:—During the continuance of the Reciprocity treaty, and even during the season of 1867, a very large and lucrative trade and business, extending a distance of 25 miles interiorly from the Strait of Canso, had existed between the merchants and inhabitants of the County of Guysborough, and the American fishermen passing through the Strait. This trade and business consisted in the sale to the Americans of very many thousands of barrels manufactured by the people of that county; in the sale of salt, bait and necessary fishing and other supplies, in the storage of the cargoes and materials of such vessels, and in the refitting of the same. This trade and business has rendered the western side of the Strait of Canso (embracing three convenient harbors and forming a portion of the County of Guysborough), the constant resort of American fishing vessels, and a very prosperous and progressive section of the province. During the present season the Department of Customs, through its officers, by a strict construction of the Treaty between Great Britain and the United States, have put a stop to all commercial intercourse between the American fishermen and the constituents of Mr. Campbell, in consequence of the refusal by the former to pay the tonnage dues now exacted from them. The effect of this prohibition has been to transfer to Prince Edward Island the whole of the advantageous trade heretofore subsisting, and as a natural consequence a very serious depression at this moment exists in Guysborough. . . . Mr. Campbell regrets to be obliged to say that he anticipates considerable commercial embarrassment in the community whose interests he represents, as the consequence of the diversion of the trade in question."

2—On the expiry in 1885 of the fishery clauses of the Washington Treaty of 1871, the Dominion Government entered upon what its supporters in the press termed "a vigorous license-and-cruiser policy," and since then American vessels have been seized for alleged violation of the Treaty of 1818 in purchasing goods and transshipping cargoes at Canadian ports. Such seizures are made under the authority of the Dominion Customs Act (1883), and of Chapter 94 Revised Statutes of Canada (1886), entitled an Act Respecting Fishing by Foreign Vessels. Sections 25, 28 and 29 of the Customs Act (46 Victoria, cap. 12) provide as follows:

"25—The master of every vessel coming from any port or place out of Canada, or coastwise, and entering any port in Canada, whether laden or in ballast, shall go without delay, when such vessel is anchored or moored, to the Custom House for the port or place of entry where he arrives, and there make a report in writing to the collector or other proper officer, of the arrival and voyage of such vessel, stating her name, country and tonnage, the port of registry, the name of the master, the country of the owners, the number and the names of the passengers, if any, the number of the crew, and whether the vessel is laden or in ballast, and if laden, the marks and numbers of every package and parcel of goods on board, and where the same was laden, and the particulars of any goods stowed loose, and where and to whom consigned, and where any and what goods, if any, have been laden or unladen, or bulk has been broken, during the voyage; what part of the cargo, and the number and names of the passengers which are intended to be landed at that port, and what and whom at any other port in Canada, and what part of the cargo, if any, is intended to be exported in the same vessel, and what surplus stores remain on board, as far as any of such particulars are or can be known to him.

"28—The master shall at the time of making his report, if required by the officer of Customs, produce to him the bills of lading of the cargo, or true copies thereof, and shall make and subscribe an affidavit referring to his report, and declaring that all the statements made in the report are true, and shall further answer all such questions concerning the vessel and cargo, and the crew and the voyage, as are demanded of him by such officer, and shall, if required, make the substance of any such answer part of his report.

"29—If any goods are unladen from any vessel before such report is made, or if the master fails to make such report, or makes an untrue report, or does not truly answer the questions demanded of him, as provided in the next preceding section, he shall incur a penalty of four hundred dollars, and the vessel may be detained until such penalty is paid."

The third and fourth sections of Chapter 94 Revised Statutes of Canada, authorise the seizure and forfeiture of unlicensed vessels found fishing or preparing to fish, or which are suspected of

having been engaged in fishing within three marine miles of the coast, and also of unlicensed vessels which have "entered such waters for any purpose not permitted by treaty or convention," that is, for any purpose which, according to the contention of the Dominion authorities, is not permitted by the Treaty of 1818. The "tackle, rigging, apparel, furniture, stores and cargo" of the vessels so seized are forfeited, together with the vessels themselves. Any person who offers resistance to seizure, or aids and abets in offering resistance, is "liable to a fine of \$800 and to imprisonment for two years." In cases where the legality of a seizure is disputed, "the burden of proving the illegality shall lie upon the owner or claimant." If judgment be given in favor of the owner, he is not entitled to costs if it be held by the Court that there was "probable cause for seizure." Vessels and cargoes condemned as forfeited under this Act are sold by public auction, and when "all necessary costs and expenses of custody and sale" have been paid out of the sum realized, the Governor-in-Council (i. e., the Dominion Government) "may apportion three-fourths, or less, of the net remainder among the officers and crew of any of Her Majesty's ships or Canadian Government vessels, from on board of which the seizure was made." In other words, the Government puts a premium on the seizure of American vessels. Finally, it is provided by Section 13, that "no writ shall be sued out against any officer or other person authorized to seize under this Act for anything done under this Act until one month after notice in writing has been delivered to him, or left at his usual place of abode by the person intending to sue out such writ, his attorney or agent." This virtually leaves the owner of the vessel without redress against the British or Canadian officer who has effected the seizure, since in the majority of cases it is impossible for the owner to serve notice upon the officer in person or to ascertain or reach "his usual place of abode," which may be in a part of the Dominion far remote from the place of seizure, or even in the British Islands. Besides seizing American vessels for trading and transshipping, the Dominion Government has punished Canadian vessels for supplying provisions to American vessels at sea outside the three-mile limit. The schooner *Seylla* of Lunenburg, N.S., was fined in 1887 for having transferred food to an American fishing vessel in distress when both were fourteen miles from shore, (Official Debates, Dominion Senate, 1887, pp. 17-22.) In January, 1889, Mr. William Ross, Collector of Customs at Halifax, N.S., was dismissed from the service of the Dominion for having permitted an American fishing vessel, the *M. A. Batson*, of Gloucester, which had entered that port to effect repairs, to transship a quantity of halibut to a steamer bound for Boston.

There is good ground for saying that, as before, such measures do not meet with the approval of the working fishermen of the Maritime Provinces, or of the farmers and storekeepers along the coasts. On the contrary, those classes of the Canadian population systematically violate them, or connive at their violation. Bait, vegetables, fresh pork, salt, barrels, and other articles, are conveyed, in the day-time as well as at night, to American fishing vessels lying outside the three-mile limit; and undoubtedly, by prearrangement with the shore inhabitants, American vessels frequently send boats into the smaller harbors and coves for the purpose of obtaining supplies. The inhabitants find the traffic profitable, and aid the American vessels to escape detection by the cruisers and customs collectors. The American skippers pay Gloucester prices in American currency for their purchases, whereas in dealing in their local markets the shore fishermen and farmers are usually obliged to accept high-priced goods in barter for their wares. The Canadian fishing-vessel owners are, it is believed, the only persons in the provinces who object to the prosecution of this

commerce. They complain that it facilitates the operations of United States fishermen, who, by replenishing their stores in the manner described, are relieved from the necessity of returning to the United States for a fresh supply; and that the immediate effect is to augment local prices and increase the cost of Canadian fish cargoes to that extent. It is notorious that, notwithstanding the large sums spent by the Dominion Government in the form of fishing tonnage bounties and of appropriations for railways and other public works of a political character, a large proportion of the shore inhabitants of Eastern Nova Scotia and Cape Breton are in a more or less destitute condition the year round. Owing to the decline in the yield of the inshore fisheries, the Nova Scotia Government has found it necessary to establish a system of out-door poor relief. A policy which debarb this unfortunate population from selling bait and other commodities to American fishermen, engaged in the common fishery of the deep sea, is surely neither humane nor just.

3. This view impressed itself upon the Government of Great Britain as long ago as 1870. In that year, as has been shown in a preceding paragraph, complaint was made to the Dominion authorities that, by their denial of trading and transshipping privileges to American fishermen, they had injured the business of the Canso region, and that Prince Edward Island, then a separate Crown colony, had opened her ports to American fishermen (although the Canadian interpretation of the treaty of 1818 had been ostensibly accepted by her), and was enjoying the profitable commerce of which Eastern Nova Scotia had been deprived. The Dominion authorities called the attention of the British Government to the course adopted by Prince Edward Island, and the Secretary of State for the Colonies requested an explanation from Sir Robert Hodgson, the Administrator of the Island. (The correspondence relating to this interesting controversy is published at length in the *Journal of the Legislative Council of Prince Edward Island*, 1871.) Sir Robert forthwith (Aug. 3rd, 1870) referred the matter to his Cabinet advisers, who procured a legal opinion from the Attorney-General and Solicitor-General of the Island, and also from Mr. (afterwards Chief Justice) Palmer, one of the most distinguished of colonial lawyers. Mr. Palmer, in his written opinion, stated "that the termination of the Reciprocity Treaty of 1854 having revived the convention of the 20th of October, 1818," the question of the legality of the acts of the Province complained of depended upon the construction placed upon the provision in that treaty that American fishermen were to be allowed access to Canadian ports, "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever." He proceeded to say:

"In construing treaties or conventions of this character, I know of no different rule of construction than that which is applied to all solemn compacts of a similar class, by which different parties have agreed to the asserted rights of each other, and to limit or bind their own. 'Treaties,' says Grotius, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith.' American fishing-vessels being allowed to enter British harbors for the purpose of shelter and of repairing damages, of purchasing wood and of obtaining water, and 'for no other purpose whatever,' these words must have a reasonable construction. I conceive they must be construed to mean purposes which are really injurious or prejudicial to the trade of the colony, or to the interests of its inhabitants. If they were to be construed literally, an American fishing vessel could not venture to bring in and land for the inhabitants of the colony a load of provisions, if they were in a state of famine, or a load of timber if the principal towns were burnt down and the inhabitants had no shelter; or to bring in and land a number of passengers which it might have rescued from a sinking ship. In case an American fishing-vessel should enter one of our ports for the purpose of transshipping a cargo of fish to ports in the United States, such act, not being provided for by the

treaty, could not be exercised as a legal right. But supposing such an entry to be made by an American vessel for the purpose of landing and transhipping a cargo of fish, caught and cured *bond fide* outside the three mile limit, I am of opinion that such an act would not render the vessel liable to seizure and confiscation."

On September 2nd, the Cabinet of Prince Edward Island drew up a minute-of-Council on the subject, which was forwarded by Sir Robert Hodgson to the Secretary of State for the Colonies. The minute set forth that the inhabitants of Prince Edward Island had not been the only persons engaged in the practice of allowing American fishermen to purchase bait, etc., and tranship cargoes in colonial ports:

"The Council remind your Honor, for the information of the Secretary of State, that the practice referred to had, until a recent period, been permitted in the Strait of Canso; that the New Brunswick Railway has transported large quantities of fish of foreign take; and that Her Majesty's representatives could not fail to be cognisant of the practice of transhipping cargoes and supplying foreign vessels. Moreover, no attempt at concealment thereof was made, in the summer of 1869, during the visit of two Vice-Admirals and several commanders of Her Majesty's ships to Charlottetown harbor; consequently it is not surprising that merchants and traders in this colony should regard the practice referred to without suspicion of its illegality."

The Council had stopped the practice, however, on the receipt of an opinion (dated August 5,) from the law officers of the Island to the effect that United States fishing vessels had no "legal right" to enter any of the harbors of the Island for the purpose of entering at the customs and landing and transshipping cargoes. The minute-of-Council proceeded as follows:

"Having thus acquitted themselves of their duty and caused the law to be carried into effect, though at a sacrifice to their fellow colonists which will be little understood or appreciated elsewhere, the Council feel bound to protest against the policy now readopted. That policy may have been well suited to the circumstances of the colonies fifty-two years ago, but the Council ventures to think it inapplicable at the present day when free trade principles, which a British statesman has declared to be the principles of common sense, form the basis of the British commercial code. Fairly stated, the old policy revived demands from the people of Prince Edward Island, the exclusion from their harbors of their best customers—customers who have employed the colonial marine in importing salt for their use, and colonial mechanics in manufacturing barrels; customers who have purchased their clothing, their provisions and their sea stores in the Island markets. These men are to be expelled until the forty million citizens of the United States succumb to the pressure put upon them by four million colonists, and consent to concede reciprocity in exchange for free access to the fishing grounds and harbors of the colonies."

"If little can be said in favor of the revived policy of 1818 in an economical point of view, still less can be said in its favor politically. It is essentially a policy of exclusion, enforced by the armed ships of Her Majesty's fleet, and, therefore, tends seriously to estrange a friendly but proud and sensitive nation whose citizens freely admit the right of Great Britain to prevent them from fishing within the three mile limit, but who assert that their cargoes of fish, taken without that limit, are not contraband, and that to refuse the right of entry to such at colonial custom houses is unfriendly, and, they affirm, illegal. And this view of the case has been taken by an eminent Queen's Counsel of the Prince Edward Island bar, Hon. Edward Palmer, who agrees with the Attorney and Solicitor-General (of the Island) in their view, opposing the cargoes of fish for which entry is sought to have been taken within the three mile limit, but asserts that for cargoes taken beyond that limit the right of entry cannot be refused."

"The Council would also urge upon the notice of the Secretary of State the impolicy of pressing an odious system upon an unwilling people. They assure Lord Kimberley that their fellow colonists are enthusiastically loyal in their attachment to Her Majesty's person and family, and are notorious for their adherence to British institutions. Their trade connections with United States citizens have not undermined their loyalty, nor persuaded them that better political institutions than their own exist elsewhere. But the Council submit that the policy of exclusion will lack one of the chief ele-

ments of success if it does not obtain the moral support of the people for whose supposed benefit it is undertaken. . . . In conclusion, the Council desire to press upon your Honor's notice, for the guidance of the Secretary of State, the importance of cultivating friendly relations with the neighboring Republic, and the danger of persevering in the present system, which is certain to produce discontent amongst the colonists, and bad feeling, if nothing worse, in the United States. A renewal of the Reciprocity Treaty would be a most welcome boon to the people of this colony, and, failing that, a reduction of the United States tariff upon the produce and manufactures of the colonies. But the Council do not believe that the United States can be coerced into compliance by the pressure now applied, and they apprehend that all such attempts, discrediting as they do the principles of free trade, will only increase the difficulty of gaining the desired concession by negotiation."

In reply to this memorandum, Lord Kimberley, in a communication dated October 20, 1870, instructed Mr. William Robinson, who in the meanwhile had assumed the lieutenant-governorship of Prince Edward Island, that he was to relax the restrictions placed upon American fishermen in regard to trading and transshipping until otherwise ordered. His lordship's letter is not printed in the correspondence. But it appears from a note written to him by Mr. Robinson (Dominion Sessional Paper No. 12, 1871), that his lordship was of opinion "that the transshipment of fish and the obtaining of supplies by the United States fishing vessels in the ports of the colony cannot be regarded as a substantial invasion of British rights." Mr. Robinson, in the note referred to, assured Lord Kimberley that the colonists were "not a little gratified" at the result of their appeal, for trade had "suffered severely" in consequence of the temporary exclusion of American fishermen. Shortly afterwards, the correspondence between him and the Island Government having been forwarded in the interval to the Canadian Government, which had entered the complaint against the Island, Lord Kimberley sent a despatch, dated February 16, 1871, to the authorities of Canada, in which, after referring to the approaching negotiations at Washington, he informed them that:

"The exclusion of American fishermen from resorting to Canadian ports, 'except for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water,' might be warranted by the letter of the Treaty of 1818, and by the terms of the Imperial Act 50 George III., cap. 38; but Her Majesty's Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the Empire; and they are disposed to concede this point to the United States Government, under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects."

Notwithstanding this concession on the part of Her Majesty's Government to the demands of its own subjects, no less than to the requirements of international comity, the Dominion Government, immediately on the expiry in 1885 of the fishery clauses of the Washington Treaty of 1871, reverted, as has been said, to the policy of prohibiting American fishermen from transshipping cargoes in Canadian ports, and of preventing them from trading with the coast population, in whose behalf the Prince Edward Island Government had entered so eloquent a protest.

4. The real purpose which that Government has in view in resorting to these unfriendly measures is known to Her Majesty's Government as well as to that of the United States. In a despatch (June 17, 1871,) written in answer to the complaints of the Dominion Government respecting the Washington Treaty, Lord Kimberley pointed out to Lord Lisgar, then Governor-General of Canada, that Canada "could not reasonably expect that this country (Great Britain) should, for an indefinite period, incur the constant risk of serious misunderstanding with the United States;

imperilling, perhaps, the peace of the whole Empire, in order to force the American Government to change its commercial policy." In reply the Dominion Government, in a minute-of-Council dated July 28, 1871 (Dominion Sessional Paper No. 18, 1872), alleged that the Reciprocity Treaty of 1854,^[u] was obtained chiefly by the vigorous protection of the fisheries which preceded it, and that but for the conciliatory policy on the subject of the fisheries which Her Majesty's Government induced Canada to adopt after the abrogation of the Treaty of 1854 by the United States, it is not improbable that there would have been no difficulty in obtaining its renewal;^[v] thus tacitly admitting that their ill-treatment of American fishermen had been designed to compel the Government of the United States to alter its tariff laws in the interest of Canada. The history of the Fishery question from the beginning bears out that avowal. Prior to 1854, the Province of Nova Scotia, in particular, adopted the harshest interpretations of the Treaty of 1818, apparently from no other motive than that of coercing the United States Congress. Besides attempting to prevent American fishermen from enjoying the liberty to navigate the Strait of Canso, and to exclude them from the Bay of Fundy, and to induce Great Britain to enforce a narrow rule with reference to minor bays, the Nova Scotia Legislature went so far (Questions Addressed by Resolution to the Law Officers in England, June 8, 1841), as to seek to confine the right of American vessels to enter the ports of that province for the purpose of purchasing wood and of obtaining water, to such American vessels as had exhausted their supply of such articles; whilst American vessels which had "provided neither of these articles at the commencement of their voyages, in their own country" were not to be allowed to procure them. The Government of Great Britain refused its sanction to that barbarous proposition. And [immediately after the abrogation of the Reciprocity Treaty in 1866 the Legislature of the same province protested against the issuing of licenses to American fishermen, on the ground that it was unjust to Canadian fishermen to allow Americans "upon nearly equal terms to fish in our waters, side by side with the former, while the American market is virtually closed by a high tariff to their products." (Dominion Memorandum on the Position of the Fishery Question, July 4, 1870.)]

Perhaps the strongest proof supplied by the Dominion Government that in applying a stringent interpretation of the treaty to American fishermen it is actuated by a desire to annoy and coerce the United States Government, is to be found in the fact that it concedes to the fishermen of France in North Atlantic waters all the privileges which it denies to the fishermen of the United States. By an arrangement made under the commercial treaty entered into by Great Britain and France in 1860, Canadian products received "favored nation" treatment in France for some years; but since 1873 they have been subjected to the ordinary French tariff. France gives no equivalent of any kind at the present time to Canada for the privileges granted to her fishermen. Nor can French fishermen claim these privileges under the provisions of the treaties of Utrecht, Paris or Versailles, relating to the possessions of Great Britain and France in North America, or of any subsequent convention. Nevertheless they have been allowed for many years to purchase bait and sea-stores on the Canadian coasts and islands, and to land cargoes of fish at Canadian ports. These cargoes are sold or consigned on commission, in bond, to the Nova Scotia fish merchants, and exported by them to the United States, Europe and the West Indies. The working fishermen of Nova Scotia, to the number of five thousand, recently petitioned the Dominion Government against the carrying on of this trade, on the ground that the French fishermen receive bounties for the

fish which they land at Canadian ports in competition with Canadian-caught fish, and also because the French fish are not always warehoused in strict accordance with the provisions of the Dominion Customs law (Section 83), "but have been handled, dried and packed in the same manner as our own fish, the only requirement being that a sufficient quantity should be entered outwards to satisfy the Customs officials that all have been exported" (Official Debates, Dominion House of Commons, 1889, pp. 1084-94). It was further stated in the debate referred to that French-caught fish are sometimes shipped to Europe in Canadian bottoms and palmed off as Canadian-caught fish in order to enable the French fishermen to evade payment of the special tariff levied by the Government of Italy upon the bounty-fed fish of France. For dry fish, caught by the fishermen who make the Miquelon Islands their base of operations, and sold or delivered in Canada, the French bounty is twenty francs per metrical quintal of 220½ pounds, or, as it is reckoned, \$1.80 (Canadian currency) for each English quintal of 112 pounds. The petitioners reminded the Dominion Government that "Canadian fishermen are granted no favors" by the French authorities at the Miquelon Islands, which is true. From an official publication (*Annuaire des Iles Saint-Pierre et Miquelon, pour l'année 1890—Imprimerie du Gouvernement, Saint-Pierre*), it appears that the importation of foreign fish at those islands is prohibited. The duty levied on foreign codfish at the ports of France itself amounts to forty-eight francs per hundred kilogrammes, or over four cents per pound. Hence, according to the theory which it invokes when dealing with American fishermen, it might fairly be argued, as the petitioners apparently sought to argue, that the Dominion Government is not consistent in granting commercial privileges to the French fishermen, seeing that, even to a greater extent than the United States, France regulates her tariff to suit herself without reference to the interests of Canada. The Nova Scotia merchants make a profit, however, out of the French fish transhipped in Canadian ports, whereas there would be no profit for them in the transshipment of American-caught fish, inasmuch as such fish would be shipped in bond direct to the markets of the United States without their services as middlemen being required. This circumstance accounts in part for their readiness to grant to French fishermen the privileges that are refused to those of the United States. The discrimination practised against Americans is attributable also to the belief of the merchants, which, as has been seen, the Government of the Dominion shares, that the United States Congress can be driven, for the sake of obtaining better treatment for the American citizens engaged in the fishery, to reconstruct its tariff policy for the benefit of the Canadian fisherman and of the Canadian producer at large. The Dominion Government cannot plead that it has no official knowledge of the preference accorded to French fishermen. Aside from the debates on the subject which have taken place in the Dominion Parliament in recent years, express provision is made for the traffic, which is a large one, by regulations issued from the Department of Customs at Ottawa.

Hon. W. Laurier, the leader of the Liberal party in the Dominion, doubtless had these things in mind when he declared (speech at St. Thomas, Ont., August 28, 1895) that it was time for Canada to "reverse her policy" towards the United States.

"If," said Mr. Laurier, speaking of the Fishery question, "the Canadian Government had followed a more friendly course, there would not have been an unfriendly feeling to-day. The United States would never have contested those rights if the rights had been asserted in a friendly manner. It was not so. The rights had been asserted in a harsh manner; they had been asserted in an offensive manner."

Mr. Laurier added that, alike in its fiscal and fishery legislation, Canada had for twenty-five years pursued towards the United States a policy "which has not been altogether hostile, but which has never been altogether friendly," and that such a policy had been deliberately adopted with a view of obtaining reciprocity from the United States.

"We were told," he said, "by Sir Charles Tupper, that the Government would find a way to compel the Yankees to grant reciprocity. What did Sir Charles Tupper say in Nova Scotia and New Brunswick, and in the House of Commons? He said that we would compel the United States to give us reciprocity. Canada is the land of my birth, of my love; Canada is the land of my heart, and it is enough for me; but it is not equal to the United States in extent; it has not even five million people, and the Americans have a population of sixty millions; and to say, as was said by the Conservative leaders at the time, that we could compel that great nation to come down to their knees and to force them to give us what they have not been willing to give us so far, was simply the greatest piece of braggadochio that has been enacted in my lifetime. Again, we had disputes with them on the treaty of 1818, with regard to the fisheries. Instead of adopting a friendly attitude the Government did everything to annoy them. * * * Again I say it is high time we reverse our policy towards the United States."

It is scarcely necessary to observe that the interpretation of the Treaty of 1818 is a matter appertaining solely to Her Majesty's Government and to the Government of the United States; and that in determining what construction should be put upon that instrument, having regard to its letter and spirit, to the circumstances existing at the time it was framed, and to the generous character of the commercial and other arrangements since mutually entered into by the contracting parties, the present fiscal and economic necessities of the Dominion of Canada can have no relevancy or bearing whatsoever upon the conclusion to be reached.

5. Coming to the treaty itself, I venture to think that in order to arrive at a just interpretation we cannot do better than proceed upon the principles laid down as far back as 1799 by Chief Justice Eyre of the Exchequer Court of England in the somewhat famous case of *Maryatt v. Wilson* (Bosanquet & Puller's Reports, Vol. 1, pp. 430-439), where the controversy turned upon the meaning and intent of Article 13 of the treaty of commerce entered into between Great Britain and the United States in 1794, and ratified the following year. One of the parties in the suit sought, by placing a narrow construction upon the words of that article, to restrict the liberty of trading with certain British possessions which had been conferred upon the United States; in fact, to confine the exports of the United States to those possessions to commodities of American growth, produce, or manufacture. His lordship took strong ground against this attempt to read into the treaty a new meaning calculated to prejudice the interests of one of the contracting parties. To "cramp" the trade of the United States by a "narrow, rigorous, forced construction of the words of the treaty" would, he said, be "chicanery unworthy of the British Government, and contrary to the character of its negotiations, which have been at all times distinguished for their good faith." And his lordship added: "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent States."

Applying this principle to the Treaty of 1818, it is extremely doubtful if, when taken in their strict literal sense as they stand, the words,

"That American fishermen shall be permitted to enter (British American) bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever,"

can be made to bear the gloss put upon them by the Dominion Government. The treaty was essentially a fishery treaty; it had nothing to do with trade or commerce. The United States was renouncing the right or claim to engage in the inshore fishery of the British American colonies within a space of three marine miles from the land, in consideration of obtaining from Great Britain an acknowledgment of certain general and specific rights in the coast fisheries at large. But the treaty gave to the fishing vessels of the United States liberty to enter British American bays and harbors for the four purposes named, and for no other purpose whatever, subject, however, to the following further limitation which follows immediately after the grant:

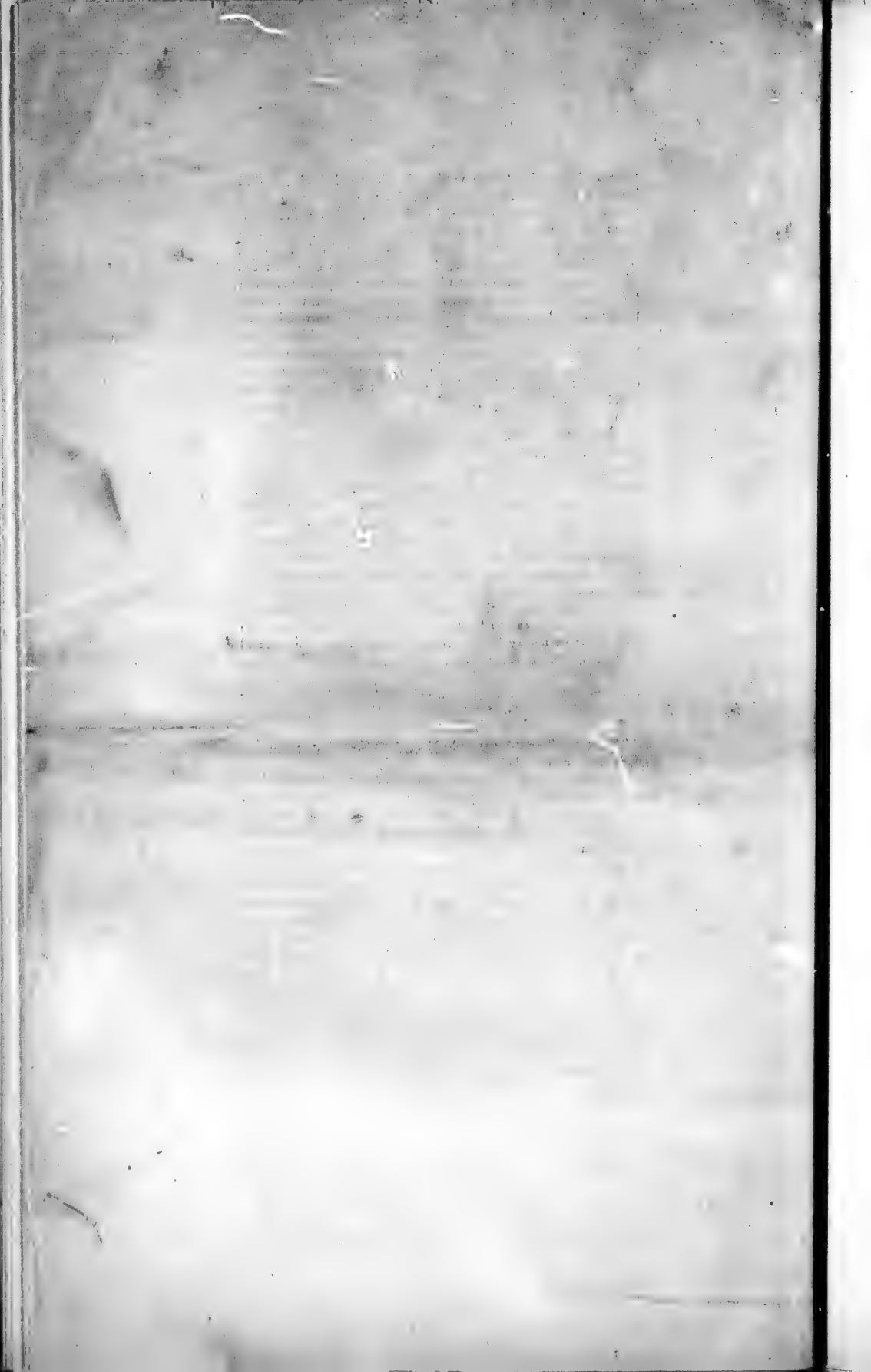
"But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Reading the grant and the limitations together, it is obvious that the latter constitute merely a restrictive provision for the protection of the British inshore fishery, and are not, as the Dominion Government assumes, a prohibition against trade, a subject indeed with which the treaty does not profess to deal. This view is supported by the historical facts of the case. Down to 1818, and for several years afterwards, no American vessels of any kind had a right to enter British American ports for trading or for any other purpose, nor were British American vessels entitled by law to enter United States ports. This reciprocal non-intercourse, which had resulted from the legislation adopted by the British Parliament in the seventeenth century, was tempered by the rights which might be demanded under the law of nations by vessels in need of services of humanity. An American fishing vessel was not only debarred, together with American trading vessels, from trading in British American ports, but from refitting, from putting her crew ashore to enable them to return home by land, and from entering such ports at all under any pretext. Hence, as Article I. implies, in permitting American fishing vessels to enter those ports for the four purposes specified, the treaty was in fact conferring upon them privileges not allowed to other American vessels, or to the vessels of any other country. In order to show that the construction which the Dominion Government has adopted was the construction placed upon the treaty by its framers, it would be necessary to prove that trading rights or privileges had actually been enjoyed by the fishing vessels of the United States down to 1818, which is out of the question. The Canadian interpretation can be accepted only by assuming that the framers made use of words which, under the circumstances then existing, they must have known to be uncalled for and liable to be misunderstood. It is apparent also that this construction contravenes the avowed intent of the framers by putting the ban upon a class of vessels which they singled out for the enjoyment of privileges; and therefore cannot be a true construction. Moreover it is a construction prejudicial to the interests of the colonies themselves, for, as has been shown, the trade of American fishing vessels is greatly prized by the coast population and its inhibition has always evoked complaint.

In order to uphold their interpretation the Canadian authorities have been obliged to resort to much curious argumentation. Canadian judges, for instance, have gravely held that the purchasing of bait by American fishermen in a Canadian port constitutes

the act of preparing to fish within the three-mile limit; so that besides being prohibited as a commercial privilege by the words "for no other purpose whatever," it is an invasion of the exclusive right of Canadian fishermen to the inshore fishery. This remarkable doctrine was promulgated by Sir William Young, Chief Justice of Nova Scotia, in the *Nickerson* case. In the *White Fawn* case Judge Hazen held, and very properly, that even "if such purchase established a preparing to fish," which he was not prepared to admit, "before a forfeiture can be incurred, it must be shown that the preparations were for an illegal fishing in British waters." Stress has been laid by Canadians upon the right of nations to judge for themselves in respect to the extent of their commercial dealings with other countries; as if the Dominion could by its legislation override the commercial arrangements entered into by Great Britain and the United States subsequent to the Treaty of 1818. Leaving these arrangements out of sight for the moment, it is questionable whether a modern State is at liberty to treat the vessels of a foreign country as the Dominion treats the fishing vessels of the United States. Assuredly the usages of international comity do not permit it, whilst British practice is against it, as may be seen by reference to the events preceding the Treaty of Nanking and subsequent conventions with China, in which the right of one nation to carry on trade, even in a poisonous drug, with another nation was asserted by force of arms.

The interpretation which ought to be placed upon the treaty at the present time is to be determined not by Canada and the United States, but by Great Britain and the United States, and by them alone. It is necessary, therefore, to attach due weight to the broader intercourse which has grown up between them since 1818, notably to the arrangement of 1830, whereby trade was for the first time made lawful between the United States and the British American colonies, on the understanding that all "restrictions on commerce and discriminations on tonnage" were to be removed. Whatever may be the case now, Great Britain was fully qualified to accept that agreement in behalf of her Canadian colonies, without their assent being required; for at that time the regulation of trade between those provinces and foreign countries was a matter of imperial jurisdiction exclusively. The Government of the United States promptly acted upon it, and from that day to this Canadian fishing as well as trading vessels entering United States ports have been accorded all the privileges now demanded for American fishing vessels which may resort to Canadian ports. It is likewise important to consider the changes which time and human invention have wrought in the fisheries and in the manner of prosecuting them. Thus, owing to the introduction of processes of artificial freezing, to the employment of vessels of a larger size and to other new methods, the liberty accorded to American fishermen of landing on certain British coasts for the purpose of drying and curing fish has ceased to be of value, and is no longer taken advantage of. Again, the use of bait for inshore fishing has been superseded by the employment of the purse seine, which has displaced the old hook and line; so that the Canadian authorities have now no shadow of ground for assuming that the purchase of bait in a Canadian port is *prima facie* evidence that the purchaser intends to fish within the three mile limit. Contrariwise, it is the best guarantee he could give of his intention to confine his operations to the deep sea fishery, which is open to all. Nor can it be urged any longer that American fishermen desire the liberty of transshipping their cargoes in Canadian ports as a pretext and means of enabling them to poach upon the inshore fisheries. The decay of the inshore fisheries is a matter which the Domin-



ion officials do not attempt to conceal. Their returns do not clearly distinguish the value of the catch effected by the boats engaged in the shore fishery from that of the catch of the decked vessels which pursue the deep-sea fishery. It is obvious, however, from a general comparison of the figures showing the value of the catch of mackerel, lobsters, herring, etc., that the inshore fishery is not nearly so profitable as it was five years ago. In his report for 1888, Lieut. A. R. Gordon, R.N., chief officer of the Dominion Fisheries Protection Service, says the condition of the inshore fisheries is still "fairly good," but "the fact that our fishermen have yearly to go further to sea to make their catch, points to a retrogression." The "final destruction" of the inshore fisheries may, he thinks, be averted by the enforcement of stringent protective regulations. In his report for 1889, the same officer speaks of the mackerel and lobster fisheries as having "greatly declined," (p. 10), and emphasizes the necessity for adopting more stringent regulations. According to the published figures of the Marine and Fisheries Department at Ottawa, the gross yield of the inshore and deep-sea fisheries of Nova Scotia, New Brunswick and Prince Edward Island, in 1885, was valued at \$13,600,000. This included the fish sold for domestic as well as those sold for foreign consumption. In 1889, the value of the gross yield was only \$10,300,000. In Nova Scotia alone the yield has fallen from \$8,300,000 to \$6,300,000. Thirty-five thousand men and boys are engaged in the Canadian inshore fisheries, and of late it has been difficult for them to eke out a living even with the aid of Government doles and bounties. Lieut. Gordon (Report for 1889, p. 15), gives a graphic account of the stress of competition amongst them:

After quoting statistics to show that no less than 1,150 miles of drift nets are employed in the inshore fisheries of the three Provinces named, Lieut. Gordon says: "We are using nets enough to wall the fish off the coast. . . The plaint of many fishermen is that it takes a great deal more twine (i.e. net) to take the fish now than formerly. I have seen St. Peter's Bay, C. B., Habitant's Bay and the North Bay of Prince Edward Island, off St. Peter's, so full of nets that it was almost impossible to work a steamer through them."

Under these circumstances it is idle to pretend that, if allowed to enter Canadian ports for commercial purposes, American fishermen would run the risk of fine and forfeiture for the sake of fishing within the three-mile limit. As a matter of fact, the denial of commercial privileges has now become and is exercised wholly as a means of prejudicing the interests of the United States fishermen engaged in the deep-sea fishery. In other words, the Treaty of 1818, which was designed as an instrumentality for protecting the exclusive right of British fishermen in the inshore fishery of the British coasts, has been transformed into an instrumentality for impeding American fishermen in the prosecution of a legitimate industry elsewhere. It is satisfactory to know that this state of things is condemned by Canadian jurists. In a recent speech in the Dominion House of Commons (Official Debates, 1889, p. 334-5), Hon. David Mills, Professor of Constitutional and International Law at the University of Toronto, reviewed the whole subject of the Canadian interpretation in these words:

"When we look at the provisions of the Treaty of 1818, we find that all the restrictions imposed upon the fishing vessels of the United States were imposed for the purpose of preventing those vessels from improperly fishing in Canadian waters. Those restrictions were incidental to the protection of our sovereignty over our own waters; and if it could be shown that these restrictions were unnecessary to that protection, then it was an improper construction of the Treaty of 1818 to so interpret it as to prevent American fishing vessels receiving the food and supplies which every civilized country accords to the vessels of another country in distress. There is, no doubt, a

wide distinction between sovereign rights and police regulations. It is absurd to dignify or to undertake to raise to the position of sovereign rights, regulations which are mere regulations of police. Those restrictions upon American fishing vessels, those provisions against their entering Canadian waters, except for certain specific purposes, are not a declaration of sovereign rights. It would be absurd to dignify them by such a name. They are declarations of our right to make extreme police regulations for the purpose of giving to the fisheries of Canada the adequate protection they may require. In the interpretation of every document you have to recognize the changes that society undergoes, the progress that a community makes. When the Treaty of 1818 was made there were no railways, no telegraph lines. There is not a word in the treaty authorising an American fisherman to land for the purpose of sending a telegram, and you have the right, under a strict construction of the treaty, to say that no American ship-master shall land to send a telegram or make a report. You have as much right to do that as to prevent them from transshipping their fish. Yet does any hon. gentleman maintain that it would be a fair construction of the Treaty of 1818 to say that it does not give to American fishermen the right to send a telegram, and therefore they have no right to exercise any such privilege upon Canadian territory?

"There are many rules to be considered in the interpretation of a treaty. I do not say that hon. gentlemen opposite (the members of the Dominion Government) have put an improper legal construction on it so far as the mere bare interpretation of the words of the Treaty of 1818 is concerned; but we must read the treaty, not wholly by the light of the events of 1818, but by the surrounding circumstances as they at this moment exist. The world has changed; society has progressed; there have been many inventions and many discoveries which have necessitated a change in the relations among independent States; and the Treaty of 1818 cannot be construed in every respect now as it was construed at the time it was entered into. Many of the provisions that the hon. gentleman (Sir John Macdonald) has acted upon are justified solely as police regulations. They are not provisions of the treaty, but they are provisions which the construction of the treaty might authorize, if it can be shown that they are necessary for the protection of those rights that were secured by the treaty. Under the convention of 1818 the United States abandoned their pretensions to fish in certain British North American waters, but they retained the right to enter these ports for certain purposes specified, and agreed that they would not enter them for any other purpose whatever. The reasons for that provision, when we look at the protocols and the correspondence that took place at the time, are easily seen. It was asserted on the part of the British negotiators that this interdiction was necessary for the protection of the fisheries, because, if the Americans were permitted to enter for any other purpose except to obtain wood and water, or to escape stress of weather, they might fish on their way. It was therefore deemed necessary to have the power of excluding them for every other purpose. It is true that we have the power, but the question is whether we are justified in using it or not. That depends on whether it is necessary for the purpose for which it was given. If you can show it is no longer necessary that this power should be exercised for the purpose of protecting the fisheries, then your right to exercise the power, so far as the vexed question is concerned, is gone. I think the hon. gentleman (Sir John Macdonald) will find at this time of day that it is pretty difficult to contend for a strict construction of the law. The hon. gentleman knows that the Minister of Customs and the Minister of Marine and Fisheries, who are largely responsible for the state of irritation that existed in consequence of what was done during the past three or four years, made these regulations, not for the purpose of preventing the Americans from fishing in our waters, but as a matter of commercial policy, thinking that by imposing such restrictions upon the American fisherman, the American Government, to secure the relaxation of those restrictions, would be disposed to enter into more favorable trade relations with us in respect of our fisheries than at that time existed. So hon. gentlemen will see that the object of the Government in making these regulations was altogether outside of the Treaty of 1818. The Treaty of 1818 had nothing whatever to do with our trade with the United States; it had nothing to do with security as more extended trade relations with the United States; it had nothing whatever to do with securing the free admission of our fish into the ports of the United States; it had simply to do with the exclusion of the American fishermen from fishing within the waters which are recognized as being within British North American sovereignty. It was for that purpose, and for that purpose alone, that these conditions were inserted in the treaty; and it is in pursuance or in maintenance of this right that the exercise of these powers of exclusion can alone be justified."

The conversion of regulations of police, which have lost their reason for being, into exclusive rights of sovereignty, and their enforcement as such for the purpose of injuring the occupation of citizens of a friendly State, with the object of compelling that State to bring its tariff legislation into harmony with the ideas and requirements of the Dominion, are so lucidly and exhaustively dealt with in Mr. Mills's observations that little remains to be said. The Government of the United States merely asks that the Treaty of 1818 should be fairly interpreted according to the manifest intent of the framers, and by the light of the new conditions which have arisen; and that Canada shall respect the forms and usages of comity and accord to American citizens those liberties and privileges which are freely conceded by the United States to Canadian citizens, and by every civilised nation to the subjects of other nations. This reasonable demand is submitted to Her Majesty's Government, with whom the treaty was contracted, in the profound belief that that Government will not countenance a line of conduct which it repudiated twenty years ago as being "inconsistent with the general policy of the Empire," and likewise as imperilling the friendship and good neighborhood which have so long existed on this continent and elsewhere between it and the Government of the United States.

